IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 12

Supreme Court, U.S.
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THE WESTERN PACIFIC RAILROAD COMPANY, ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES NORTHERN PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC COMPANY

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OPINIONS BELOW

The unanimous opinion of the three-judge District Court (R. 730-734) is reported at 230 F. Supp. 852. The opinion of the Interstate Commerce Commission (R. 623-645) is reported at 316 I.C.C. 795.

JURISDICTION

The jurisdictional requisites are adequately set forth in the separate briefs for appellants and the United States.

STATUTE INVOLVED

Section 3(4) of the Interstate Commerce Act,[1] 24 Stat. 380 as amended (49 U.S.C. § 3(4)) provides:

> "All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

[1] The Interstate Commerce Act is hereinafter referred to as Act.

While Sections 1(4), 15(3) and 15(4) of the Act (49 U.S.C. §§1(4), 15(3) and 15(4)) prescribing the duty of carriers to establish through routes and authorizing the Commission to establish such routes as it finds "necessary or desirable in the public interest," subject

to certain safeguards, are not directly involved in this appeal, they were involved in the proceeding before the Commission; therefore, for the convenience of the Court they are set forth in Appendix A to this brief.

QUESTION PRESENTED

The question presented is whether the entire Interstate Commerce Commission and a unanimous District Court have properly construed Section 3 (4) of the Interstate Commerce Act in holding that The Western Pacific Railroad Company, which does not have a direct physical connection and does not participate in through routes with the appellee carriers,[2] is not a connecting line of the Northern Pacific Railway Company and Union Pacific Railroad Company at Portland, Oregon.

STATEMENT

A. Nature of the Proceedings

This is a direct appeal pursuant to 28 U.S.C. §§1253 and 2101 (b) from a final judgment filed on June 22, 1964, by a district court of three judges especially constituted pursuant to §§2284 and 2325 dismissing appellants' complaint which sought to set aside an order of the Interstate Commerce Commission which found that the establishment of through routes and joint rates in connection with the appellee carriers through Bie-

[2] Northern Pacific Railway Company, Camas Prairie Railroad Company and Walla Walla Valley Railway Company (Northern Pacific) and Union Pacific Railroad Company (Union Pacific).

ber, California, and Portland, Oregon, between points in California, on the one hand, and points in Oregon, Washington and Idaho on the other, is not necessary or desirable in the public interest under Section 1(4) of the Act. The Commission also found that the refusal of the appellee carriers to establish through routes and joint rates with the appellants The Western Pacific Railroad Company and its short line subsidiaries[3] through Bieber via Portland, between the same points on the same basis as those maintained by the appellee carriers with the Southern Pacific Company (Southern Pacific) through Portland, does not result in discrimination against the Western Pacific in violation of Section 3(4) of the Act.

B. Historical Background of the Commission's Order

For more than half a century, the Northern Pacific and the Union Pacific have maintained through routes and a full line of joint through rates with the Southern Pacific via Portland between points in the states of Oregon, Washington and Idaho, on the one hand, and points in California on the other (R. 627).[4] Since 1931 the Western Pacific together with the Santa Fe and the Great Northern has maintained joint through rates over routes through Bieber, between points in California and

[3] The Sacramento Northern Railway and the Tidewater Southern Railway Company, hereinafter collectively referred to as "Western Pacific" or "appellants."

[4] Hereinafter referred to as the Southern Pacific route.

points in Oregon, Washington and Idaho on the same basis as those maintained by the Northern Pacific and the Union Pacific with the Southern Pacific (R. 626, 627).[5] The Western Pacific connects with the Santa Fe at Stockton, California, on the south and with the Great Northern at Bieber on the north (R. 626). Bieber is 490 miles south of Portland and 246 miles south of Bend, Oregon, which is served by the Oregon Trunk, a wholly-owned subsidiary of the Spokane, Portland and Seattle Railway Company (SP&S),[6] and by the Union Pacific (R. 625, 640).

In addition to the full line of joint rates available over the two major competitive through routes described above, the Milwaukee Road maintains joint rates with the Western Pacific through Bieber (R. 627). Further, the Union Pacific publishes competitive rates to the Los Angeles area over its single-line route via Salt Lake City and also participates in routes with the Western Pacific and Southern Pacific via Utah and Nevada interchanges (R. 626, 627).[7] For the convenience of the Court a scale map of the territory involved showing the lines of railroad in appropriate color is contained in Appendix B of this brief.

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[5] Hereinafter referred to as the Bieber route.

[6] While the SP&S is not a party to this proceeding, it is under the common control and management of the Northern Pacific and Great Northern. See *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, ac'd 182 F. Supp. 81 (E.D. Wis.), 366 U.S. 745 (1961).

[7] The Northern Pacific and Union Pacific maintain a few joint rates with the Western Pacific via the sought routes; however, the Commission found, and the District Court affrmed, that through routes do not exist. See *Chicago, M., St. P. & P. R. Co.* v. *U. S.*, 366 U.S. 745 (1961); *Thompson* v. *United States*, 343 U.S. 549, 557 (1952).

C. Proceedings Before the Commission and the District Court

Western Pacific in its complaint to the Commission alleged that the Northern Pacific, Union Pacific, Great Northern, Santa Fe and their short-line connections had violated both Sections 1(4)[8] and 3(4) of the Act and sought an affirmative order requiring the establishment of through routes and joint rates through Bieber via Portland, between points in California and points on the Northern Pacific and Union Pacific and their short-line connections in Oregon, Washington and Idaho (R. 624, 625).

Division 2 of the Commission found that the public interest did not require the establishment of the sought through routes and joint rates under Sections 1(4) and 15(3) of the Act[9] and that the sought routes would, in many instances, short-haul the Northern Pacific and the Union Pacific without their consent, contrary to Section 15(4) of the Act (R. 644, 645).[10] In addi-

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[8] 49 U.S.C. §1(4) requires railroads, *inter alia*, to "establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto;" and "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, * * *"

[9] 49 U.S.C. §15(3) authorizes the Commission, after full hearing, to establish, *inter alia*, such through routes, joint classifications and joint rates, applicable to the transportation of property by railroad as it finds "necessary or desirable in the public interest" together with the terms and conditions under which such through routes shall be operated.

[10] 49 U.S.C. §15(4) restricts the power of the Commission under paragraph (3) of the same section to require a railroad, without its consent, to embrace less than its entire length, subject to certain exceptions; namely, (a) the through route would be "unreasonably long" or (b) the through route is needed "to provide adequate, and more efficient or more economic, transportation: * * *"

tion, the Commission found that the Western Pacific is not a "connecting line" of the Northern Pacific and Union Pacific at Portland within the meaning of Section 3(4) of the Act. Further, even if it were a connecting line, the evidence of record did not establish the necessary similarity of circumstances and conditions which would justify equality of treatment (R. 643).

Following the denial of its petition for reconsideration by Division 2 of the Commission, and ultimately by the entire Commission, the Western Pacific instituted an action in the United States District Court for the Northern District of California seeking to have the Commission's order set aside, contending, *inter alia*, that the Western Pacific is a connecting line of the appellees Northern Pacific and Union Pacific at Portland within the meaning of Section 3(4) of the Act and that the evidence of record established the necessary similarity of circumstances and conditions sufficient to require equality of treatment at Portland (R. 614-622). The District Court dismissed the complaint holding that the Commission had properly determined that the Western Pacific is not a "connecting line" within the meaning of Section 3(4) of the Act (R. 729-734). The Court did not consider it necessary to decide whether the Commission had erred in its finding that the evidence of record did not establish the necessary similarity of circumstances and conditions which would justify equality of treatment at Portland or to decide the other issues raised by the Western Pacific (R. 731, 732).

SUMMARY OF ARGUMENT

The Commission and the District Court's broad definition of the term "connecting line" in Section 3(4) of the Act to include all lines which either have a direct physical connection or participate in through routes and rates is supported by the language of the statute, its history and its common law background. The many duties imposed by Section 3(4) extend solely to "connecting lines" and not routes or competing routes as appellants contend. Since no physical connection exists between the Western Pacific and the Northern Pacific and Union Pacific at Portland and the Western Pacific does not participate in through routes and rates with the Northern Pacific or the Union Pacific (*Thompson* v. *United States*, 343 U.S. 549, 557 (1952)), it is not under the decision of this Court in *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 293 (1932), a connecting line of the appellees.

Railroads are not required to establish routes and rates via all possible gateways and junctions. *Routing Restrictions over Seatrain Lines, Inc.*, 296 I.C.C. 767, 744 (1955). Section 1(4) of the Act requires railroads to establish reasonable through routes with other such carriers and just and reasonable charges applicable thereto. The Commission properly found that the public interest did not require additional routes and rates between points in California and points in the Northwest. While the Western Pacific has not challenged this finding, it does contend that the refusal of the appellees to join the

Western Pacific in the establishment of such additional routes and rates violates Section 3 (4).

Western Pacific's unique contention that all that is required is physically available service ignores the qualifying adjective "connecting" and would, perforce, make every railroad in this country a connecting line of the Northern Pacific and Union Pacific at Portland. Such a construction would result in a multiplicity of circuitous routes contrary to the National Transportation Policy. The United States while recognizing that Section 3 (4) is limited to a particular class of carriers asserts that a railroad is a connecting line if it is part of a route which connects with defendant so long as all participants in such route "are willing to cooperate in providing through transportation in combination with the defendant" (p. 16). This extraordinary definition is without statutory or judicial precedent and is both unworkable and indefinitive because it is dependent upon the consent of all intermediate carriers.

The District Court properly recognized that the Commission's definition conforms to the purposes of the Act and the National Transportation Policy for it stated "This Court is satisfied that the present definition fully comports with the statutory purpose, and that any further expansion of the term is not warranted. * * *" (R. 734). Moreover, this definition recognizes and preserves the vigorous rail competition which presently exists in this area between the Bieber route partners, on the one hand, and the Southern Pacific route partners on the other.

In addition, the Commission found that the record did not establish the similarity of circumstances and conditions necessary for a finding of discrimination under Section 3(4). The District Court did not reach this issue and normal practice, which appellees urge be followed, is to remand to the District Court for further consideration if this Court should find that Western Pacific is a connecting line of the appellees at Portland. However, if this Court should consider the discrimination issue, it will find that the Commission's treatment of the issue was thorough, that its findings are within the Commission's special competence, are based on adequate subsidiary findings which are supported by substantial evidence and should be affirmed. *Minneapolis & St. Louis R. Co.* v. *U. S.*, 361 U.S. 173 (1959).

ARGUMENT

I

The Commission and the Court Properly Found That the Western Pacific Is Not a Connecting Line

A. *The Statutory Language and History Support the Decision.*

The Western Pacific's line does not extend north of Bieber, California, which is 490 miles south of Portland, Oregon. Moreover, the Western Pacific does not participate in through routes with the Northern Pacific

or the Union Pacific. In fact, this is the very genesis of the complaint. Therefore, the Commission and the District Court held that under Section 3(4) of the Act Western Pacific does not meet the requirement that a connecting line "is one which has either a direct physical connection at the common interchange or is one which makes up a 'through route' through the interchange point" (R. 733). As we shall demonstrate, this construction is required both by the language and history of the statute.

Section 3(4) of the Act, *inter alia*, prohibits a railroad from discriminating in its "rates, fares, and charges between connecting lines." The term "connecting line" is defined to mean "the connecting line of any (railroad)" or "any common carrier by water subject to the (Act)." This paragraph imposes a number of other requirements for the benefit of "connecting lines"; namely, the providing of "reasonable, proper, and equal facilities for the interchange of traffic" and for the "receiving, forwarding, and delivering of passengers or property." Further, it prohibits undue "prejudice (of) any connecting line in the distribution" of unrouted traffic. The term "connecting line" is obviously used in the same sense throughout the paragraph.

This paragraph of the Act must be read in *pari materia* with the other provisions of the Act. Section 1(4) of the Act requires carriers, *inter alia*, "to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges and classi-

fications applicable thereto."[11] The Commission has the power pursuant to Section 15(3) of the Act to require carriers to establish whatever through routes and joint rates are "necessary or desirable in the public interest" (49 U.S.C. §15(3)).

However, the duty of a carrier to establish reasonable through routes does not require it to establish routes and rates via all possible gateways and junctions. The duty imposed is succinctly stated in *Routing Restrictions over Seatrain Lines, Inc.*, 296 I.C.C. 767 (1955), as follows:

> "* * * Nevertheless, there is nothing in the act that requires a railroad to establish through routes via all possible junctions or by way of all railroads or water lines with which it might connect, or between all points or areas which might be reached through those connections. *On the contrary, the law is definitely that a carrier has the initial duty and the right to select the through routes over which it holds out to transport through traffic and participate in the through rates.* * * *
>
> "The law imposes certain obligations upon a carrier which joins with its connecting carrier in establishing a through route. *It is not unreasonable for such a carrier to refuse to assume those obligations over all routes, and it cannot be required under the law to assume those obligations over a particular route merely because a shipper or connecting carrier selects it.* In this connection it

[11] While the Western Pacific alleged a violation of this section, the Commission found that establishment of through routes and joint rates was not shown to be necessary or desirable in the public interest, and Western Pacific does not challenge this finding.

> is noteworthy that for many years the duty imposed by section 1(4) upon common carrier by railroad included the 'duty to establish through routes,' and it was not until 1940 that Congress deliberately modified that paragraph so as to restrict the provision to 'reasonable through routes.' " (p. 744) (Emphasis supplied.)

Despite the fact that the prohibition against discrimination relates solely to "rates, fares, and charges" between "connecting lines," the Western Pacific and the United States repeatedly urge that the appellee carriers are discriminating against the Bieber route.[12] At the outset, a sharp distinction must be drawn between a "route" and a "connecting line." The duties enjoined by Section 3(4) of the Act are imposed for the benefit of "connecting lines" not "routes" or even "competing routes."

The Western Pacific and the United States simply are attempting to amend this provision by substituting the term "route" for the statutory term "connecting lines." The term "line" means "an operating unit under one management." *Regenhardt Const. Co.* v. *Southern Ry. in Kentucky*, 297 Ky. 840, 181 S.W. 2d 441, 444 (1944). The terms "route"[13] and "through route"[14] are used throughout Part I of the Act. In fact, the Act refers to lines making up the "through route"

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[12] Brief for Appellants pp. 3, 15, 19, 20, 21, 22, 54, 58, 60, 63, 64, 65, 66, 69, 73, 74; Brief for the United States pp. 2, 6, 7, 12, 13, 15, 16, 21, 29, 30.

[13] 49 U.S.C. §§1(1), 1(2), 6(1), 6(12).

[14] 49 U.S.C. §§1(4), 6(1), 15(3), 15(4), 15(8).

as "participating carriers" not as "connecting lines" (49 U.S.C. §1(14)). At no point in the Act is the term "connecting line" used either together or interchangeably with the term "route" or "through route."

In the Mann-Elkins Act of July 18, 1910, Congress amended Section 4, the long and short haul provision of the Act, by adding after the words "over the same line" the additional words "or route," thus extending the prohibition against accepting a greater charge for the shorter than for the longer haul to the same "route" as well as the same "line" (36 Stat. 547). This amendment resulted in a new and broader interpretation of the Act with the result that it was held, for the first time, to embrace instances where carriers join their lines and thus form a route. *Davis* v. *Parrington*, 281 Fed. 10 (9th Cir.), rev'd on other grounds, 264 U.S. 403 (1924).

The Western Pacific attempts to bring itself within the term "connecting lines" as used in Section 3(4) of the Act by distorting the term to include any "continuous series of lines where the traffic on one could physically move onto the tracks of the others" (p. 19). In short, "connecting line" should be read as "any line." The United States which supports the Western Pacific is apparently unable to subscribe to such a request for judicial legislation. In an attempt to include the Western Pacific and yet ascribe some meaning to the qualifying adjective "connecting," it suggests that "connecting line" includes any road which forms "a continuous route connecting" with appellees "so long as all the par-

ticipants in the continuous connecting route are willing to cooperate in providing through transportation" (p. 16). The obvious conflict between these two positions will be considered further, *infra* p. 37, et seq.

The Western Pacific presents a labored historical argument (pp. 23-29) in a vain attempt to bolster its position and, finally, declares that the legislative history affirmatively supports its interpretation (p. 59). There is simply no substance to this contention, as the following analysis discloses.

The term "connecting lines" in Section 3(4) of the Act had its origin in Section 3, paragraph two, of the original Act to Regulate Commerce of 1887 (24 Stat. 380). Despite two amendments[15] to this section the term "connecting lines" has never been changed. The original Act, Section 3, paragraph two, provided:

> "Every common carrier * * * shall * * * afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such com-

[15]February 28, 1920, C. 91 §405, 41 Stat. 479, which renumbered the provision as paragraph 3, eliminated the final clause and added a prohibition against prejudicing a connecting line in the distribution of unrouted traffic and September 18, 1940, C. 722, Title I, §5(e), 54 Stat. 903, which renumbered the provision as paragraph 4 and defined the term "connecting line" to include, in addition to railroads, the connecting lines of any common carriers by water subject to Part III of the Act.

> mon carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (p. 380)

The term "routes" was also employed in the original Act in Section 6, which required the publishing of rates, fares and charges, and provided that where passengers or freight pass over continuous lines "or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission." (Id. at 381). It is thus clear that both in the original and the present Act the term "connecting lines" and the term "routes" are treated as separate and distinct terms.

Because a statute "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent,"[16] we will briefly consider the common law duties involving connecting lines to demonstrate that the Commission's decision is entirely consistent with the statutory purpose.

At common law, it was the duty of a carrier to transport a shipment safely to the end of its line and then deliver it to the next carrier who was also under a corresponding duty to receive and carry it. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 324 (1872);

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[16] *United States* v. *Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951).

Myrick v. *Michigan Central R. R. Co.*, 107 U.S. 102, 106 (1882).[17] Carriers were not required even to make track connections[18] or to enter into contracts with other carriers for joint routes and rates. *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry.*, 41 Fed. 559, appeal dismissed 149 U.S. 779 (1893); *Chicago & N. W. Ry. Co.* v. *Osborne*, 146 U.S. 354 (1892). A railroad had the power to locate its own stopping places and could not be required to stop at another railway junction and interchange business nor was it required to give one connecting line the same facilities and the same rates that it accorded to another line with which it had entered into special contract relations for a continuous movement and had arranged facilities accordingly. *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U.S. 667, 685 (1884).

It is thus evident that at the time the Act was passed, carriers were not obligated to interchange traffic with each other even at a direct physical connection if one line had already provided another point for the interchange of traffic. There was no requirement to establish through routes and rates. In fact, a carrier could enter into a through route arrangement with one connecting line and refuse to enter into similar arrangements with another line with which it connected at the same point. These were the problems at which Section 3(2) of the original Act were directed, namely, to insure that those lines which had a direct physical connec-

[17] The obligation of an initial carrier under the English law continued throughout the entire route. (*ibid.*)

[18] *Wisconsin &c. R'd Co.* v. *Jacobson*, 179 U.S. 287, 296 (1900).

tion received the same treatment provided, of course, a similarity of circumstances and conditions existed as between the connecting lines.

Western Pacific quotes briefly from the Senate Report[19] dealing with the 1886 bill (p. 25) and a statement of Senator Cullom[20] also pertaining to the 1886 bill (p. 26). Appellants failed to point out that the 1886 bill did not contain the provision involved in the instant case, namely, the provision against discrimination in "rates and charges" between "connecting lines," which is found for the first time in the Conference Report of 1887. It is thus evident that Senator Cullom's remarks relate solely to providing reasonable interchange facilities which, perforce, relate to lines that have a direct physical connection. Moreover, the only legislative explanation of this provision prohibiting discrimination in "rates and charges" between "connecting lines" is the remarks of Senator Spooner which are quoted in the brief of the Interstate Commerce Commission.[21] This explanation clearly indicates that the provision was intended for application to lines which have a direct physical connection.

The English statute and cases to which Western Pacific refers (pp. 26-29) furnish no support for its position. The term "continuous line of railroad communications," employed in the English statute, does not appear in our Act. It apparently was rejected in

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[19] S. Rep. No. 46, 49th Cong., 1st Sess., 215-216 (1886).

[20] 17 Cong. Rec. 3472 (1886).

[21] 18 Cong. Rec. 653, App. 3 (1887) (remarks of Senator Spooner).

favor of the term "connecting lines," which was not used in the English statute. It will also be noted that the English statute makes no reference to rate discrimination between "continuous lines of railroad communications." In interpreting Section 3, paragraph two, of the original Act (24 Stat. 380) the court stated that the English statute and cases were "not of much assistance. The English act is different from ours. * * * and the difference has been construed as substantial." *Oregon Short-Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 61 Fed. 158, 161 (1894), appeal dismissed 164 U.S. 703.

The early state statutes and cases to which Western Pacific refers (pp. 28, 29) are irrelevant and of no assistance. None of the statutes involved are even remotely similar to Section 3 (4) of the Act. None of the cases cited involved factual situations which have any resemblance to the instant proceeding. Moreover, at least some of these cases actually involved a direct physical connection.[22] Finally, an imposing number of state cases can be cited to support the proposition that the adjective "connecting" requires a direct physical connection.[23]

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[22] For example, in *Philadelphia & E. R. R.* v. *Catawissa R. R.*, 53 Pa. 20, 61 (1866), the court simply held that two roads of different gauges which physically intersected were connected.

[23] *Georgia R. & Banking Co.* v. *Maddox*, 116 Ga. 64, 42 S.E. 315 (1902); *Logan* v. *Central R. R.*, 74 Ga. 684 (1885); *Texas & N. O. R. Co.* v. *Gulf & I. Ry. Co.*, 54 S.W. 1031, 1033 (1899), aff'd 93 Tex. 482 and 56 S.W. 328; *International & G. N. R. Co.* v. *Railroad Com. of Texas*, 86 S.W. 16, aff'd 99 Tex. 332, 89 S.W. 961 (1905); *Missouri Pac. Ry. Co.* v. *Young*, 25 Neb. 651, 41 N.W. 646 (1889).

We have demonstrated that there is nothing in the provisions of Section 3(4), its legislative history, or in the common law background against which the statute was enacted that even by the slightest inference could be construed to support the Western Pacific contention that a "connecting line" means "a continuous series of lines where the traffic on one could physically move onto the tracks of the others." (p. 19). In fact, the language of Section 3(4) and its legislative history unequivocally support the Commission and District Court's decisions.

B. *The Atlantic Coast Line Case Supports the Decision.*

Both Western Pacific and the United States analyze the decision of this Court in *Atlantic Coast Line R. Co.* v. *U. S.*, 284 U.S. 288 (1932), in a fruitless attempt to sustain their position (App. brf. pp. 30-40; U.S. brf. pp. 21-26). This case provides solid support for the decision of the Commission and the District Court, as the following discussion indicates.

The decision of this Court in *Atlantic Coast Line R. Co.* v. *United States, supra*, had its genesis in the application of the Atlantic Coast Line (Coast Line) and the Louisville & Nashville to lease the Carolina, Clinchfield & Ohio Railway (Clinchfield) which extended between Elkhorn City, Kentucky, and Spartanburg, South Carolina, where it connected with the Charleston & Western Railroad (Charleston), also owned by the Coast Line, which extended via Greenwood,

South Carolina, to Augusta, Georgia, and with the Piedmont & Northern Railway (Piedmont), an independent line which extended only to Greenwood. *Clinchfield Railway Lease*, 90 I.C.C. 113 (1924). The Clinchfield formed a link in many existing routes between points in the southeastern states and points in other parts of the country. Among the objecting lines in the lease proceedings was the Georgia & Florida Railroad (Georgia) whose line extended as far north as Augusta. It stated that it was extending its line to Greenwood to form a direct connection with the Piedmont and that if the Coast Line were permitted to lease the Clinchfield, it would discriminate against this extension in favor of the Charleston.

Despite these objections, the Commission approved the lease subject to a number of traffic conditions, two of which were involved in the subsequent proceeding herein; namely, Condition 3 which required complete neutrality on the part of the Clinchfield in the handling of all traffic and Condition 4 which required that the Clinchfield be used as a link for through traffic by all carriers "now connecting or which may hereafter connect" with the line of the Clinchfield (*ibid* at 133-134).

Following the lease proceeding, the Georgia applied for, and was granted, authority to extend its line from Augusta to Greenwood, thus forming a direct link with the Piedmont in competition with the Charleston. *Reorganization of Georgia & Florida Ry.*, 117 I.C.C. 473 (1926). The Commission's report and order revealed that the extension was built for the express purpose of

permitting the applicant to participate with the Piedmont in a large volume of through traffic handled by the Clinchfield and available under the existing routes and rates (*ibid* at 475). The Coast Line, though notified, did not oppose the application (*ibid* at 479).

Then immediately prior to the opening by the Georgia of its Greenwood extension on June 1, 1929, the Coast Line and the Charleston filed 337 schedules which sought to cancel the existing through routes with the Piedmont and Georgia, effective May 20, 1929, and later dates. *Restriction in Routing between Greenwood and Augusta*, 165 I.C.C. 3 (1930). Upon protest of the Piedmont (the direct physical connection) and the Georgia (a participant in existing through routes and joint rates), 303 of these schedules, or all of the schedules which specifically named the Piedmont and the Georgia as present participating carriers in the established routes with the Clinchfield, were suspended and finally ordered cancelled, with the result that the traffic continued to move over the extension under the existing tariffs. The remaining schedules, 34 in number, became effective after a brief delay because they did not concern existing through routes in which the Piedmont and the Georgia presently participated with the Clinchfield (*ibid* at 4). The Commission properly held that the cancellation of the joint rates resulted in the closing of existing routes in violation of the traffic conditions imposed in Condition 4 of the lease proceeding. *Clinchfield Railway Lease*, *supra*. In concluding that the cancellation of the through rates violated the

conditions of the lease, the Commission held that the Georgia was a connecting line of the Clinchfield despite the fact that there was not a direct physical connection because it participated in through routes with the Clinchfield under the existing schedules which the Clinchfield sought to cancel, in so doing, the Commission stated:

> "There is no warrant for limiting the meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term. * * *" (165 I.C.C. 15-16)

The district court affirmed the Commission's order and in response to appellants' argument that Condition 4 of the lease merely required that the Clinchfield be maintained as an open route for carriers "then directly connecting therewith or, at the most, for carriers which might under the approval of the Commission be allowed to make such direct connection thereafter," the court stated:

> "And, as to condition 4, it certainly could not have been intended to restrict the requirement of neutrality for the benefit of those roads having direct connection with the C., C. & O. when, as said by the commission, the term 'connecting lines' is commonly used 'in referring to the lines in general making up a through route.' " (pp. 241-242)

This Court, in affirming the decision of the district court, held that the Georgia was a connecting line of the Clinchfield despite the absence of a direct physical connection because it participated with the Clinchfield in through routes and rates. *Atlantic Coast Line R. Co.* v. *U. S.*, 284 U.S. 288. This Court's definition of a "connecting line" which is entirely consistent with, and fully supports, the result reached in the instant proceeding was applied specifically with reference to Section 3(4) of the Act in Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F. 2d 930, 937 (7th Cir.), aff'd 357 U.S. 77 (1958).

Western Pacific concludes its treatment of *Atlantic Coast Line R. Co.* v. *U. S.*, *supra*, by citing its sequel *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489 (1933) (pp. 39-40). The United States discusses the same case at page 23, fn. 12, and at page 25, fn. 15, and erroneously asserts that it is contrary to the Commission's decision in the instant case. That case involved a joint complaint by the Piedmont, a direct connection of the Clinchfield at Spartanburg, and the Georgia, an indirect connection but a participant in a large number of through routes and rates with the Clinchfield and, hence, a connecting line under the definition adopted by the Commission and the District Court in the instant case, charging that the refusal of the defendants to participate with complainants between Spartanburg and Augusta on the same basis as the Clinchfield participated with other connections violated the conditions of the Clinchfield lease and Section 3(3) (now 3(4)) of the Act (*ibid* at 490, 492). The Commission so found (*ibid* at 499, 500). Thus, the decision is entirely consistent

with, and fully supports, the Commission's position in the case at bar.

C. *The Water Carrier Cases Support the Decision.*

Western Pacific next contends (pp. 43-48) that the decisions of this Court and the Commission involving inland water carriers support its extraordinary construction of the term "connecting line." The United States contends that the same cases support its position (p. 26). On the contrary, as we will show, these decisions involving as they do a direct connection, clearly support the decision of the Commission and the lower court.

In *American Barge Line Co.* v. *Alabama G. S. R. R.*, 296 I.C.C. 247 (1955), complainant inland water carriers sought a reduction in the rail rates on ex-barge grain from various river ports from the "local" basis of rates to the "proportional" or "reshipping" basis of rates which applied from the same river ports on ex-rail traffic. Complainant water carriers contended, *inter alia*, that the refusal of the railroads serving the river ports to accord the same basis of rates on grain brought to the ports by barges as applied on grain transported to the ports by rail violated Section 3(4) of the Act. The Commission denied all relief on the grounds, *inter alia*, that the barge lines were not "connecting lines" of the rail carriers within the meaning of Section 3(4) of the Act. Three years later it affirmed this decision (303 I.C.C. 463). The following year it modified its order

so as to grant relief from certain Tennessee River ports (306 I.C.C. 167). On appeal, the district court reversed, holding that the barge line involved was a connecting line of the defendant railroads within the meaning of Section 3 (4) of the Act. *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411, aff'd *per curiam* 361 U.S. 353 (1959). In so doing, the court stated:

> "The contention is advanced with apparent seriousness by some of the intervening defendants that Arrow is not a connecting carrier in relation to the railroads which serve the Tennessee River ports. This argument is wholly without merit. At each of the Tennessee River ports there are facilities by which grain can be transferred directly from barges into rail cars, but the normal type of transfer is through an elevator. We hold that Arrow is a connecting carrier of the outbound rail carrier when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for the subsequent reshipment of that grain. * * *" (p. 419).

It is thus evident that a physical connection was present, to the extent that is possible between these two separate modes of transportation, and it was on this basis that the court held the barge line to be a "connecting line" of the rail carriers within the meaning of Section 3 (4) of the Act.

Appellants also rely upon *Interstate Commerce Commission* v. *A. L. Mechling Barge Line*, 330 U.S. 567 (1947), and *Dixie Carriers, Inc.* v. *United States*, 351

U.S. 56 (1956).[24] Both cases involve the maintenance of rates on ex-barge traffic on a higher level than ex-rail traffic. In both cases this Court held the maintenance of the higher basis of rail rates without proof of higher costs for handing such traffic constituted discrimination against the ex-barge traffic in violation of the National Transportation Policy which requires that the Act be administered so as to recognize and preserve the "inherent advantages" of all modes of transportation subject to the Act (54 Stat. 898, 899; 49 U.S.C. preceding notes §§ 1, 301, 901). In both of these cases a direct physical connection was available and, therefore, they are fully consistent with the decision of the Commission in the instant proceeding.

The water carrier cases relied on by the Western Pacific all involve a direct physical connection, to the extent it is possible, between two separate modes of transportation, and, therefore, it was not necessary to find that through routes presently existed in order to bring them within the purview of Section 3 (4) of the

[24] In the *Mechling* case, *supra*, the commodity involved was grain and the point of physical connection for transfer of the lading was Chicago. In fact, until 1939 the rail rates for movement of the grain beyond to the East were the same whether the commodity was brought to Chicago by barge or rail. The barge lines were attacking a three-cent higher rail rate that applied on ex-barge as distinguished from ex-rail grain. In the *Dixie Carriers* case, *supra*, the commodity involved was sulphur and the point of physical connection for transfer of the lading from barge to rail was East St. Louis. The railroads refused to enter into joint rail-barge rates at East St. Louis and insisted upon their local rate to destination. However, the rail carriers maintained joint through rates with each other over East St. Louis. Barge lines sought a rail rate beyond St. Louis on the same basis as applied in the case of an all-rail movement.

Act following the 1940 amendment (54 Stat. 903). Rather than aid the Western Pacific, these cases also support the Commission's decision.

D. *The Switching Cases Furnish No Support for Western Pacific's Novel Contention.*

Western Pacific next contends (pp. 48-51) that *Chicago, I & L. Ry.* v. *United States*, 270 U.S. 287 (1926),[25] supports its position. The District Court properly found its reliance on this case was "misplaced" because it "involved reciprocal switching arrangements and presented no question of whether the carriers * * * were 'connecting lines' for Section 3(4) purposes." (R. 734, 230 F. Supp. 855). That case, popularly known as the "Michigan City switching case," involved the refusal of three railroads which served Michigan City, Indiana, to enter into reciprocal switching arrangements with another line, namely, the South Shore, which served the same station on the same basis as they maintained with each other; rates were not involved.[26]

The three defendants; namely, the Pere Marquette, the Monon and the Michigan Central, asserted that a difference in transportation circumstances and condi-

[25] This case arose under the Transportation Act of 1920 which, unlike the present Act, required "All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, * * *" (41 Stat. 479).

[26] *Chicago, Lake Shore & S. B. Ry. Co.* v. *L. E. & W. R. R. Co.*, 88 I.C.C. 525, 526 (1924); Brief for the United States, p. 4, *Chicago, I. & L. Ry.* v. *United States, supra.*

tions existed because the only carrier with whom the South Shore enjoyed reciprocal switching arrangements, namely, the Lake Erie & Western, had to switch the South Shore's cars from 1.38 miles to 3.88 miles to the defendants' lines. The South Shore was within the switching district at Michigan City and the three defendant lines switched cars to and from the South Shore as an industry but not as a carrier (270 U.S. at 291). Thus, the defendants' lines reached the lines of the complainant under existing switching arrangements.[27]

The Commission properly held that the defendants' refusal to switch plaintiff's cars while switching the traffic to all other lines established a violation of Section 3 of the Act. *Chicago, Lake Shore & S. B. Ry. Co.* v. *L. E. & W. R. R. Co.*, 88 I.C.C. 525. The district court affirmed without a written opinion. On appeal to this Court, the question presented, as stated in the brief of the United States, was "Does the non-inclusion of the South Shore in the reciprocal switching arrangements established by the carriers serving Michigan City constitute unjust discrimination against the South Shore"?[28] This Court affirmed holding that if discrimination exists, the order removing it may extend to every carrier that participates in inflicting the injury. The Michigan City switching case did not involve a request for rates as does the instant proceeding, but

[27] Brief for the Interstate Commerce Commission at pp. 24, 25 and 41, *Chicago, I. & L. Ry.* v. *United States, supra.*

[28] Brief for the United States, p. 10, *Chicago, I. & L. Ry.* v. *United States, supra.*

simply a request for inclusion in an existing reciprocal switching arrangement at a station physically served by the complainant. Obviously, it furnishes no support for the Western Pacific's position.

Appellants cite *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321 (1956), in support of their contention that "a 'through route' in the sense that the term is used in the Act itself is not essential to a finding of discrimination under §3(4)" (pp. 52-53). In that case the Union Pacific had not accorded to the Rio Grande at Ogden, a carrier with which it had a direct physical connection, the same basis of rates it had accorded to the Bamberger Railroad at that point. *Union Pacific Railroad Co.* v. *United States of America*, 132 F. Supp. 72, 81 (1954). That case simply holds that "through routes" are not essential to a finding of discrimination under Section 3(4) of the Act if a direct physical connection is present; therefore, it supports the position of the Commission and the District Court in the instant proceeding.

Appellants also cite *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136 (1917), and *United States* v. *Illinois Cent. R. R.*, 263 U.S. 515 (1924), both of which arose under Section 3(1) of the Act to support their contention (pp. 53, et seq.). Section 3(1) of the Act prohibits discrimination between persons, companies, localities, ports, gateways, transit points, regions, districts, territories or particular descriptions of traffic and specifically provides that the provision "shall not be construed to apply to discrimination, prejudice,

or disadvantage to the traffic of any other carrier of whatever description." Section 3(1) unlike Section 3(4) of the Act does not require connecting-line status and, therefore, neither of these cases furnish any support for appellants' position.

Western Pacific also relies on *Pennsylvania Co.* v. *United States*, 236 U.S. 351 (1915), to support its position (pp. 55-57). That case involved a request by the Rochester Company which served New Castle, Pennsylvania, for non-discriminatory switching arrangements with the Pennsylvania at that point. The Pennsylvania maintained reciprocal switching arrangements with all of the carriers serving that point except the Rochester Company. The Court stated that there were two points of physical connection between the lines of the Rochester Company and the Pennsylvania within the switching limits of the station (*ibid* at 359). The Court further stated that the Rochester cars were brought to an actual physical connection with the Pennsylvania (*ibid* at 363). Despite the physical connection, the Pennsylvania refused to switch the cars of the Rochester Company 1,000 feet to its depot facilities. This case involved a direct physical connection between the complainant company, which sought simply nondiscriminatory switching arrangements, with the Pennsylvania and, therefore, is consistent with and fully supports the Commission's decision in the case at bar.

E. *The Unique Definition Fashioned by the United States Is Not Supported by the Statute or the Cases and Is Unworkable.*

Unlike the Western Pacific which seeks to extend the term "connecting line" as used in Section 3(4) of the Act to include any line, the United States attempts to ascribe some meaning to the qualifying adjective "connecting" and still include the Western Pacific. It therefore suggests that the term includes any road which forms "a continuous route connecting" with appellees "so long as all the participants in the continuous connecting route are willing to cooperate in providing through transportation." (pp. 16, 21, 29).

We shall demonstrate that this extraordinary definition, which apparently was fashioned for the purpose of this case, has no statutory or judicial precedent and is completely inappropriate.

In attacking the comprehensive definition adopted by the Commission and affirmed by the District Court, the United States poses three hypothetical situations (pp. 18-21) which it asserts established the "arbitrary nature of the Commission's definition" (p. 18).

The hypothetical examples posed by the United States serve to demonstrate the position of Section 3(4) in the over-all legislative pattern.

Unless a complaining carrier either has a direct physical connection or presently participates in existing through routes with the defendant carrier, it is not similarly situated and, hence, cannot be the subject of discrimination which, perforce, requires equality of

circumstances and conditions. Section 3(4) is not the touchstone for the solution of all route or rate disputes. If new routes and rates are required in the public interest between carriers not enjoying a direct physical connection or not presently participating in through routes and rates, necessary routes and rates may be established under Section 15(3) of the Act on the Commission's own initiative or on complaint of an allegedly aggrieved carrier.

In the present situation, if the Bieber route carriers are, in fact, being discriminated against, then logically all Bieber route carriers should be complainants. Great Northern is the key carrier in the first two hypothetical examples advanced by United States, and the United States rather boldly asserts that if Great Northern were the complaining railroad, it would be entitled to precisely the relief sought by the Western Pacific (p. 19). This is a large presumption and simply serves to illustrate the fatal defect in the definition of "connecting lines" urged by the United States. If the Great Northern were the complainant, it would be required to establish, first, the fact of its direct physical connection with Northern Pacific and Union Pacific at Portland[29] and, second, the similarity of circumstances and conditions as between the sought and the existing routes. While both the Great Northern

[29] As a complainant Great Northern would be required to develop the circumstances of direct connection with appellee carriers at Portland, which apparently takes place over the intervening agency of Oregon Trunk Railway, Spokane, Portland and Seattle Railway Company and Northern Pacific Terminal Company (R. 37, 268, 269).

and the Santa Fe admitted their willingness to participate in the sought joint rates (R. 8-9, 11-12), they did not assist the Western Pacific either before the Commission or the District Court nor did they present any evidence.

The Western Pacific concedes that to prevail under Section 3(4) of the Act it is essential that it establish a similarity of circumstances and conditions as between the allegedly preferred and the allegedly prejudiced line (p. 74). Because the Western Pacific does not directly connect with the appellees and does not participate with them in through routes, it would be difficult in the extreme to establish a similarity of circumstances and conditions in the absence of the active participation in the proceeding of the Great Northern and the Santa Fe. The hypothetical examples suggested by the United States support rather than impeach the definition adopted by the Commission in this proceeding.

The United States asserts (pp. 24, 25) that the Commission and the District Court improperly defined the term "through route" in holding that through routes do not presently exist. The definition adopted by the Commission and the District Court was prescribed by this Court in *Thompson* v. *United States*, 343 U.S. 549 (1952). The United States contends that the definition is irrelevant for two reasons, first, because it relates to Section 15(4), the short haul provision of the Act, which "bears no relationship to the existence of discrimination between carriers, the evil at which Section 3(4) is directed" (p. 24). The definition enunciated

in the *Thompson* case, *supra*, affirmed the earlier definition adopted by this Court in *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136 (1917), which did involve Section 3 as well as Section 15 of the Act.[80] Second, the United States suggests that if the definition is relevant, then the term "through route" relates to the rates between the complainant and the intermediate carriers and not with the line that is alleged to have discriminated. In support of this erroneous contention it refers to *Atlantic Coast Line R. Co.*, *supra*, and states that the Georgia & Florida was "held to connect with the defendant, not because of any pre-existing routes with the *defendant*" (p. 25), but because of routes with the intermediate carrier. As we pointed out earlier in this brief (pp. 22-24), the Georgia & Florida was a party to the same existing through routes and rates both with the Piedmont & Northern and with the Clinchfield. If it were not, there would have been no need to file the hundreds of schedules involved in the litigation to cancel its participation in such routes. To contend that the term "through route" as employed by the Commission in that proceeding, which language was adopted by Mr. Justice Brandies in this Court's opinion, relates solely to existing routes with the intermediate carrier rather than the same existing routes with the carrier charged, is the most unwarranted sort of speculation. In fact, if such speculation were justified the 34 sched-

[80] This definition is the same as that adopted by the Commission in *Through Routes and Through Rates*, 12 I.C.C. 164, 166, as well as that stated by the Commission in its report to Congress, Twenty-First Annual Report of the Interstate Commerce Commission 75-76 (1907).

ules which became effective in *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3, 4 (1930) because they did not affect existing routes and rates between the Clinchfield and the Piedmont & Northern and the Georgia & Florida would also have been found unlawful. Further, the Commission's interpretation of the term does not permit any carrier to insulate itself against a charge of discrimination, rather, it merely places an outer limit on its meaning and attributes a congressional purpose to the use of the qualifying adjective "connecting."

Western Pacific, while avoiding an explicit definition of "connecting line" status as it has throughout this proceeding, suggests that Section 3(4) may be invoked in any instance where rates available over one route are not available over a competing physically available route (p. 21). This construction is far broader than appellants sought in the District Court where it indicated that its connections would not necessarily be connecting lines under Section 3(4) of the Act.[31]

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[31] During oral argument before the District Court even appellants recognized the hazard of such a construction for their counsel stated as follows:

> "We are not saying that under Section 3(4) our connections to the southwest would necessarily be entitled to attack this particular act of discrimination." (R. 682).

The Western Pacific's change of position between the District Court and this Court and its change of position before the Commission make Mr. Justice Jackson's pointed comment in *Orloff* v. *Willoughby*, 345 U.S. 83, 87 (1953), most appropriate: "We grant certiorari, and in this Court the parties changed positions as nimbly as if dancing a quadrille."

In contrast to appellants' all-inclusive construction, the United States suggests that the term be defined to include all carriers forming a continuous route which connects with the line charged provided "all the participants in the continuous connecting route are willing to cooperate in providing through transportation in combination with the defendant" (p. 16). Obviously, the United States rejects Western Pacific's contention that "any line" is a "connecting line" within the meaning of Section 3(4) of the Act.

The interpretation suggested by the Western Pacific is patently absurd. Such a construction would permit any railroad to invoke Section 3(4) of the Act, regardless of the need for the establishment of additional routes under Sections 1(4) and 15(3) of the Act, simply by asserting that it physically connects with other lines which ultimately connect with the carrier with whom the through routes and rates are sought at some distant point; consequently, the failure of the line charged to enter into joint through rates with the complaining line would constitute a violation of Section 3(4) of the Act. Complete nullification of the adjective "connecting" would result if the Western Pacific's position were adopted by this Court.

The definition suggested by the United States is also subject to many infirmities. How do you determine when the connecting line is part of a "continuous connecting route" or a "connecting route"? (pp. 16, 21,

29). The term "continuous connecting route" or "continuous route" cannot be found in the Act,[32] nor was it used in the English statute which employs the term "continuous line of railroad communication."[33] Should we construe the term "continuous connecting route" to mean a "through route"? That seems unlikely because the United States contends that the accepted definition is irrelevant in a Section 3(4) proceeding (p. 24). The United States then inconsistently asserts in the following paragraph of its brief that the establishment of through routes with the intervening carriers results in forming a route "the whole of which connected with the defendant" (p. 25). Thus, we are left to speculate as to the meaning of "continuous connecting route."

This novel term which the United States has created to assist the Western Pacific presents additional complications because it is qualified by the phrase "so long as all the participants in the continuous connecting route are willing to cooperate in providing through transportation in combination with the defendant" (p. 16). Thus, if one of the lines is unwilling to cooperate in providing transportation, the complainant would not be a "connecting line" within the meaning of Sec-

[32] Appellees were unable to find any cases defining the term "continuous connecting route" and only one case defining the term "continuous route," namely, a Pennsylvania case which held that the term as used in a state act requiring the lessor and lessee railroads to form a continuous route did not require an absolute passage of the same car from one railroad to the other without break or interruption. *Appeal of Pittsburgh & B. Traction Co.*, 165 Pa. 468, 30 Atl. 931 (1895).

[33] The Railway and Canal Traffic Act of 1854, 17 & 18 Vict. c. 31, sec. 2.

tion 3 (4) of the Act. If such lines were complainants, their willingness to provide the transportation would be self evident. However, if the definition proposed by the United States were adopted, the intermediate lines would not be required to be complainants and could decide at any time that they are not "willing to cooperate in providing through transportation in combination with the defendant" (p. 16) and thus destroy the connecting-line status of the complaining line. Such an illusive test furnishes no sound basis for determining connecting-line status of railroads under Section 3 (4) of the Act. It seems apparent that this definition was expressly fashioned to meet the circumstances of this case and reluctantly adopted by the United States in a desperate attempt to bolster appellants' vulnerable position.

The unworkable, though dissimilar, interpretations of the term "connecting line" advocated by the Western Pacific and the United States contrast sharply with the definition adopted by the Commission and the Court which includes any line having a direct physical connection with the appellees or any line regardless of where situated if it participates in through routes with the appellees. In short, this definition requires either a direct physical connection or a business connection before Section 3 (4) is applicable.

Section 3 (4) of the Act imposes many obligations: (1) It requires all carriers to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines; (2) It requires all carriers

to provide reasonable, proper and equal facilities for the receiving, forwarding and delivering of passengers or property to or from connecting lines; (3) It prohibits all carriers from discriminating in their rates, fares and charges between connecting lines, and (4) It prohibits all carriers from unduly prejudicing any connecting lines in the distribution of freight that is not specifically routed by the shippers. These duties are substantial. Obviously, a carrier cannot provide facilities for interchanging traffic, receiving, forwarding or delivering passengers or property with carriers with whom it has no direct physical or business connection. If it were otherwise, it would impose an overwhelming burden upon all American railroads.

If the Western Pacific's position were sustained, all direct route carriers operating between any two points could be charged with discrimination if they refused to establish through routes with other carriers, literally hundreds of miles away who have never participated in the routes or rates involved and do not have direct physical connections with the direct route lines. The complaining carriers would simply assert that through a number of intermediate carriers they reach the direct route lines and therefore are connecting lines. Rather than engage in prolonged litigation involving the similarity of circumstances and conditions as between the direct lines and the circuitous lines, the lines charged might well agree to establish through routes and rates with the circuitous lines. Thus, Western Pacific's interpretation of the term "connecting line" could result

in a multiplicity of wasteful circuitous routes contrary to the National Transportation Policy which requires the Commission to administer the Act so as to promote "safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." (54 Stat. 898, 899; 49 U. S. C. preceding notes §§ 1, 301, 901). As the Court stated in *Southern Railway Company* v. *United States*, 167 F. Supp. 747 (D. Ga. 1958), involving the cancellation of certain joint through routes:

> "Use of the words 'economical' and 'economic' in the National Transportation Policy clearly demonstrates the intent of Congress that one of the primary concerns of Congress is to have the Commission give serious attention to the matter of providing economical transportation; that is, transportation at as low rates to the public as may be consistent with the other requirements of the Policy. * * * A significant comment appears in the sub-committee report (on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce) which is part of the Legislative history of this amendment (1958) to the Interstate Commerce Act:
>
> > 'The railroad industry has not, in the subcommittee's opinion been sufficiently interested in self-help in such matters as * * * abolishing of unnecessarily circuitous routes for freight movements.'
>
> "Wasteful operation, regardless of what particular carrier suffers the economic loss temporarily is one of the things to be avoided if the

elimination of the wasteful procedure does not run counter to other mandates of the Act."

The United States asserts that the Commission's definition is contrary to its purpose in creating the Bieber route (pp. 28-29). Nothing could be further from the fact. Through routes and joint rates via the Bieber route were established in 1931 by the Santa Fe, the Western Pacific and the Great Northern, following the extension of the lines of the Western Pacific and the Great Northern approved by the Commission in *Great Northern Ry. Co. Construction*, 166 I.C.C. 3, 170 I.C.C. 399 (R. 626). It was not until this complaint was filed some thirty years later that the Western Pacific contended that it was a connecting line of the appellees within the meaning of Section 3(4) of the Act. The Western Pacific never contended in the *Construction* case that the Northern Pacific or Union Pacific would be required to establish through routes and joint rates with it via Bieber and Portland. The Western Pacific represented that it would establish through routes and joint rates via Bieber with the Great Northern and the Santa Fe which it did upon completion of the line. This is the competition which the Commission's construction order contemplated and provided, namely, the competition via the Bieber route partners, on the one hand, and the Southern Pacific route partners on the other. For a further discussion of the competition the exists between the railroads in this area as the result of the Commission's

order authorizing the line extension see *infra* Part II, pp. 69-71.

The repeated and erroneous assertion by the Western Pacific and the United States that Section 3(4) of the Act can be utilized to prevent discrimination against a route as distinguished from a connecting line, simply fails to properly distinguish between Sections 1(4) and 3(4) of the Act. The duties prescribed by Section 3(4) of the Act extend to connecting lines only and not routes. As the Commission stated in *Nicholson Universal S. S. Co.* v. *Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934):

> "Although our power to require the establishment and maintenance of through routes and joint rates has been greatly extended since the enactment of the original Act to Regulate Commerce by section 15(3) and section 6(13) of the present act, *the wording of section 3(3)* [now 3(4)] *has remained substantially the same and does not include within its terms any reference to routes.* * * *" (Emphasis supplied.)

Appellants further contend that the Commission's construction of Section 3(4) of the Act results in a complete anomaly. However, when this section is considered together with Sections 1(4) and 15(3) of the Act, it is entirely consistent with the legislative pattern. The obligation of a carrier engaged in interstate commerce to enter into a contract with another carrier for joint routes and rates was first prescribed by the Hepburn Act of June 29, 1906, which imposed a

duty on all carriers to establish through routes and joint rates and authorized the Commission to establish through routes "provided no reasonable or satisfactory through route exists" (34 Stat. 589). The Mann-Elkins Act of June 18, 1910, greatly expanded the Commission's power by authorizing it to establish alternate through routes subject to certain necessary safeguards (36 Stat. 551). Thus, if a through route is established, either by voluntary action of the carriers involved or by Commission order, the provisions of Section 3(4) of the Act apply, notwithstanding the absence of a direct physical connection at a common interchange. However, until a through route is established, a carrier which lacks a direct physical connection at a common interchange must rely on Sections 1(4) and 15(3) of the Act to establish a through route before it can invoke the provisions of Section 3(4) of the Act.

In essence, the Western Pacific is attempting to accomplish indirectly under Section 3(4) of the Act that which it, admittedly, cannot do directly under Sections 1(4) and 15(3) of the Act, namely, establish new through routes and joint rates. The Western Pacific in abandoning before the Commission its claim under Sections 1(4) and 15(3) of the Act apparently conceded that the Commission properly found that the numerous existing through routes and joint rates are adequate to meet the needs of the shipping public (R. 644, 645).

We submit that there is no escape from the proposition that if the construction of the term "connecting lines" as used in Section 3 (4) of the Act, urged by the appellants, were adopted, the term, of necessity, would embrace every railroad in this nation and, perforce, would make every railroad, regardless of where situated, the connecting line of every other railroad. The Western Pacific's extraordinary construction would result in a multiplicity of circuitous routes, contrary to the public interest and the National Transportation Policy. Further, the unique definition urged by the United States, while not quite as inclusive as appellants, is wholly without precedent and is completely unworkable.

In the last analysis, we have a construction of the statute by the agency charged with its enforcement, which has been acquiesced in by these appellants for approximately 30 years. In such circumstances, the agency's construction is entitled to the greatest weight.[34] Finally, as we have demonstrated, the broad and precise definition adopted by the Commission and affirmed by the District Court is required by the statutory language, its legislative history, the statutory pattern and established judicial precedents and should, therefore, be sustained by this Court.

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[34] *U. S.* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534, 549 (1940); *United States* v. *Bergh*, 352 U.S. 40, 47 (1956); *Adams* v. *United States*, 319 U.S. 312, 314-315 (1943); *U. S.* v. *Citizens Loan Co.*, 316 U.S. 209 (1942); *Inland Waterways Corp.* v. *Young*, 309 U.S. 517 (1940), and *N. Y. Central Securities Co.* v. *U. S.*, 287 U.S. 12, 24 (1932).

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II

The Commission Correctly Determined That the Evidence Did Not Establish Similarity of Circumstances and Conditions and, Therefore, Rate Discrimination Is Not Present.

A. *If the Issue of Discrimination Is Reached, Normal Practice Requires Remand to the District Court.*

As we have demonstrated in Part I, *supra*, the Commission and the District Court correctly determined that the Western Pacific was not a connecting line of the Northern Pacific or the Union Pacific at Portland. In addition, however, the Commission found that the evidence of record did not establish the necessary similarity of circumstances and conditions which would justify equality of treatment at Portland (R. 643, 645). Because the District Court agreed with the Commission on the issue of connecting-line status, it did not find it necessary to resolve the remaining issues presented by appellants' complaint (R. 731, fn. 3). The Western Pacific now makes the extraordinary request that if this Court should find that the Commission and the District Court erred with respect to the connecting-line issue, the Court then proceed to analyze the record and determine, without receiving the benefit of the views of the District Court, that the Commission erred

on the second basis also (p. 64 et seq.).[35] Because of this unwarranted request, appellees are constrained to brief this additional point.

The United States does not concur in this request and points out that it would be the Court's normal practice to remand the case to the District Court for judicial review of the question of discrimination. *F. T. C.* v. *Anheuesr-Busch,* 363 U.S. 536, 542 (1960) (p. 13, p. 31, fn. 8). In a brief discussion, the United States observes that resolution of the second issue requires a factual evaluation not attempted by the District Court and suggests a number of circumstances which would militate against a finding of discrimination even when connecting lines engage in differing rate practices (p. 30, fn. 18).

Appellees suggest that if this Court should reverse the Commission and the District Court on the threshold issue—Western Pacific's status as a connecting line —the normal procedure should be followed and the case be remanded to the District Court for judicial review of the Commission's subsidiary findings and ultimate conclusion that there is no discrimination.

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[35] Western Pacific recognizes the necessity of proving that circumstances and conditions are similar (R. 681, Brief for Appellants, p. 74). This Court has ruled that there must be similarity of circumstances and conditions in discrimination cases arising under Section 3 of the Act. *Ayrshire Corp.* v. *United States,* 335 U.S. 573, 587 (1949); *United States* v. *Illinois Cent. R. R.,* 263 U.S. 515, 524 (1923); *Interstate Comm. Commiss.* v. *B. & O. Railroad,* 145 U.S. 263, 276 (1892).

B. *The Conclusion That There Is No Discrimination Is Fully Supported by the Record.*

In the unlikely event that this Court should decide that remand is not required and proceed to a consideration of the discrimination issue, then appellees submit that under settled principles of judicial review the conclusion of the Commission that Northern Pacific and Union Pacific are not in violation of Section 3(4) of the Act should be affirmed.

Under the doctrine of administrative finality judicial review of an agency decision is limited to questions of constitutional power, statutory authority, and the basic prerequisites of proof. The judicial function is exhausted when there is found to be a rational basis for the conclusions of the administrative body. If there is warrant in the law and facts for what the Commission has done, the Court will not substitute its own view concerning what should be done for the Commission's judgment upon matters committed to its determination. See *Rochester Tel. Corp.* v. *U. S.*, 307 U.S. 125, 139 (1939); *Miss. Valley Barge Co.* v. *U. S.*, 292 U.S. 282, 286 (1934); *U. S.* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1946); *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 488 (1951). The Court has declared that whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that has been confided by Congress to the judgment and discretion of the Commission and upon which its decisions are

not to be disturbed by the courts, except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Board of Trade* v. *United States*, 314 U.S. 534, 546 (1942).

The Commission fully discharged its administrative responsibility by applying the proper standard by which discrimination should be judged, drawing subsidiary findings from an evaluation of the evidence and reaching its ultimate conclusion in the exercise of its specialized judgment. We will first demonstrate that the Commission applied the correct standard to resolve the question of discrimination and, second, that the evidence fully supports the Commission's determination.

1. Commission Standard for Determining Similarity of Circumstances and Conditions Has Administrative Precedent and Judicial Approval.

In its Discussion and Conclusions, the Commission held that Section 3(4) requires equality of treatment, but that equality of treatment is determined by similarity of circumstances and conditions (R. 640). Having stated the general principle, the Commission reviewed the evidence, made subsidiary findings, reached the conclusion that the evidence does not establish the similarity of circumstances and conditions which justifies equality of treatment, and entered its final conclu-

sion that Northern Pacific and Union Pacific were not in violation of Section 3 (4) of the Act (R. 643, 645).

The proper test of similarity of circumstances and conditions in a Section 3 (4) case is essentially a simple one—it calls for a comparison of transportation conditions underlying the rates in issue. When, as here, alleged discrimination arises from the difference between higher combination rates over one route compared with lower joint rates over another route, the transportation conditions over both routes must be compared to determine if there is such a similarity as to require equality of rate treatment. This is what the Commission did. It compared transportation conditions on the route over which the *higher combination rates* apply—Santa Fe and Western Pacific to Bieber, Great Northern to Portland and then Northern Pacific or Union Pacific beyond between points in California and points in the Northwest with transportation conditions on the route over which the *lower joint rates* apply—Southern Pacific to Portland then Northern Pacific or Union Pacific beyond between the same points in California and the same points in the Northwest. As a result of this comparison, the Commission determined that the evidence before it did not establish the necessary similarity of circumstances and conditions which justifies equality of treatment (R. 643).

The Commission relied on *Routing, Coal From Origins on Louisville & N. R.*, 313 I.C.C. 752, 758 (1961) (R. 640), sustained on appeal in *Atlantic Coast Line Railroad Co.* v. *United States*, 205 F. Supp. 360 (M. D.

Ga.), aff'd *per curiam* 371 U.S. 6 (1962), for the applicable test to determine the discrimination issue.[36] In that case, the Commission compared transportation factors over complete routes from representative origins to representative destinations, not just the portion of the route operated by the allegedly offending carrier. This decision is clear support for a test of circumstances and conditions that takes into consideration interchanges, circuity and wasteful back-hauls over the entire routes. Macon was the common point, it being alleged that the Southern Railway discriminated against the Georgia Railroad by accepting traffic from the Central of Georgia at that point on the basis of through route, joint rates while not so accepting the Georgia Railroad's traffic. The plaintiff contended, as does the Western Pacific in the instant case, "that to avoid discrimination Southern must perform the same service at the same rate for all cars delivered to Macon by any carirer" (p. 365).

The court in rejecting this argument did not confine its comparison of circumstances and conditions to the services performed by the allegedly discriminating carrier only, but looked at the entire route from Atlanta through the common point of Macon to the representative destination. This is emphasized by the court's conclusion that "Section 3(4) requires equality of treat-

[36] If this Court should find the Commission has applied an erroneous test, it should have the opportunity of considering the evidence in the light of the proper standard. *Schaffer Transp. Co.* v. *U. S.* 355 U.S. 83 (1957); *I. C. C.* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961); *American Trucking Assns.* v. *U. S.*, 364 U.S. 1, 15 (1960).

ment between connecting lines but equality of treatment involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia" (p. 365).

The *Routing, Coal* case, *supra*, in turn, relies on *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I.C.C. 389, 391 (1935), and *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 658 (1953), as authority for the standard of comparison to be employed. In *Quanah*, the Commission rejected an argument that a carrier must treat all of its connections exactly alike under Section 3(3) of the Interstate Commerce Act [now §3(4)] asserting that equality of treatment must be determined by similarity of circumstances and conditions (211 I.C.C. 389, 391). Since the alleged discrimination was bottomed on joint rates providing for transportation service over the defendants' and other railroads at a lower level than was established in connection with the complainant, the Commission compared overall-service factors, not just the services performed by the defendants. This evaluation included a study of distances, transit time and number of interchanges through the Floydada gateway in connection with the complainant with the same transportation and service factors over existing, and allegedly preferred, through routes in connection with other railroads (211 I.C.C. 389, 391, 392). After further hearing the Commission held the defendants to be in violation of Section 3(3) [now §3(4)] on the basis of evidence of substantial similarity of transpor-

tation circumstances and conditions. *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 226 I.C.C. 201 (1938).

In an apparent effort to minimize the test of similarity of circumstances and conditions the United States suggests that the choice between the Bieber route and the Southern Pacific route is a choice basically to be made by shippers, not by the Northern Pacific and Union Pacific (p. 31, fn. 18). This proposal ignores the basic duty of railroads to establish *reasonable* through routes and *just* and *reasonable* rates with other carriers under Section 1(4) of the Act. It ignores the duty of the Commission to promote adequate, economical and efficient service and to foster sound economic conditions as expressed in the National Transportation Policy. These overriding considerations should not be defeated by the desire of a shipper to use a slow or circuitous service for his own purposes.[37]

The suggestion of the United States that the shipping public be granted the routes and rates it chooses is best answered by referral to the Commission's conclusion, following an evaluation of shipper testimony, that establishment of the through routes and joint rates requested by the Western Pacific was not shown to be necessary or desirable in the public interest (R. 645).

[37] Carrier practices involving delayed handling or slow, back-haul services have been condemned as being wasteful, not in the public interest, and resulting in increased costs that must be absorbed by the general public. See *United States* v. *Union Pacific Railroad Company*, 173 F. Supp. 397, 410 (S.D. Iowa), aff'd *sub nom Union Pacific R. Co.* v. *United States*, 362 U.S. 327 (1960); *Routing Exceptions, A., T. & S. F. and Connecting Carriers*, 325 I.C.C. 228, 233, 235 (1965).

2. The Commission's Conclusion That Discrimination Does Not Exist Is Based on Adequate Findings and Is Overwhelmingly Supported by the Evidence.

The Commission's findings with respect to dissimilarity of circumstances and conditions are supported by substantial evidence and should not be set aside on review. See *United States* v. *Drum*, 368 U.S. 370, 386 (1962); *U. S.* v. *Carolina Carriers Corp.*, 315 U.S. 475, 483 (1942). It is particularly significant that Western Pacific, a complainant before the Commission seeking to set aside an established rate structure and obliged to prove that it is entitled to equal rate treatment by the Northern Pacific and Union Pacific, made no effort to submit a comprehensive comparison of transportation conditions over the allegedly preferred and allegedly prejudiced routes.

Of the five company witnesses called by Western Pacific, only its Superintendent of Transportation testified to transportation conditions and he limited his testimony to a generalized description of the Bieber route and the interchange at Portland. The northern terminus of the Western Pacific is at Bieber, 490 miles from Portland. The Great Northern performs all of the transportation between Bieber and Portland. Despite this fact, it did not submit any evidence at the Commission hearing.

The defendants Northern Pacific and Union Pacific and intervening defendant Southern Pacific presented

detailed evidence of distances, transit times, costs, operating circumstances and physical transportation characteristics in order to permit a comparison of circumstances and conditions over the allegedly preferred and allegedly prejudiced routes. The Commission's consideration of this issue was thorough; it devoted five pages of its report to a discussion of the evidence and a statement of its findings of fact (R. 635-640).

With regard to the operating routes north of Portland, the Commission found that, under the complaint, the Northern Pacific would be required to use a circuitous route to points east of the Cascade Mountains. For example, from San Francisco to Walla Walla, Washington, the present Southern Pacific - Northern Pacific route is 1,014 miles, while via the Bieber route to Portland then Northern Pacific, the distance would be 1,339 miles (R. 636).

The Western Pacific asserts that this finding is erroneous, contending that the evidence is directly to the contrary (p. 69, referring to R. 146, 147). In challenging the Commission's finding, the Western Pacific relies on the testimony of a shipper who was not qualified in this area and who did not refer to the routing obligations incumbent on the Northern Pacific. Moreover, under cross-examination the same witness acknowledged that he was not aware of the substantially greater circuity that would occur over the Northern Pacific route; he erroneously thought that the routings to be established would be identical with the routes that now exist via Portland (R. 146, 147).

Opposed to this vague understanding is the unequivocal testimony of Northern Pacific's General Freight Agent that shipments routed to an eastern Washington point such as Spokane via the Bieber route to Portland, thence Northern Pacific, would necessarily move over Northern Pacific's circuitous route through Auburn, Washington (R. 270). The finding based on this evidence is squarely within the Commission's particular realm of competence. The Commission is well aware that under Section 15(8) of the Act (49 U.S.C. §15(8)) a shipment routed Western Pacific - Great Northern - Portland - Northern Pacific would move over the Northern Pacific route.

If there is any doubt as to the correctness of the Commission's finding, it should be dispelled by the explicit testimony of appellants' own witness, Western Pacific's Superintendent of Transportation, who stated that a car routed via Bieber route to Portland and then Northern Pacific would be moved west from Wishram, Washington, to Vancouver, Washington, by the Great Northern then interchanged to the Northern Pacific at Portland and moved on to Spokane through Auburn. The Western Pacific witness testified that the circuity involved in this handling would be substantial (R. 73). In a footnote, Western Pacific implies that the shipments of cast-iron pipe prove that no circuity is involved; but the record is silent as to the routing and movement of this traffic (p. 69).

Circuity would be as great in connection with the Union Pacific, the Commission finding that to points

east of the Cascades the allegedly prejudiced route would require a westward-vs.-eastward backhaul along the Columbia River aggregating slightly more than 200 miles (R. 636). To points west of the Cascade Mountains, the Commission found that movement over the allegedly prejudiced route would require a costly and wasteful 20-mile round-trip movement between Portland and Vancouver in the case of both Northern Pacific and Union Pacific (R. 637).[38]

These findings are supported by testimony of the rail officials intimately acquainted with the operation (Ex. 27, R. 217, 218, 232, 235, 250, 278, 467). Once again, the Commission's finding is confirmed by the Western Pacific witness who testified that participation of Union Pacific in the Bieber route would result in an additional backhaul of some 200 miles (R. 70). The Western Pacific witness also acknowledged that cars routed via Northern Pacific or Union Pacific would be moved from Vancouver to Portland, a distance of 10 miles, and then handled 10 miles north, a circuity not present if moved by the Great Northern over the Bieber route as it now exists (R. 71, 72).

The portions of the allegedly preferred and allegedly prejudiced routes south of Portland were compared, and

[38] A glance at the map attached to this brief, Appendix B, reveals that all shipments routed over the Bieber route to be interchanged with the Northern Pacific or Union Pacific would move by the Great Northern to Wishrom, then west over the SP&S to Vancouver. After a transfer to Portland to effect interchange, the cars would move east in a backhaul movement to distinations such as Spokane, or in a return movement to Vancouver when routed to a destination such as Seattle.

on the basis of distance, interchanges and physical characteristics the Commission found that transportation conditions are more favorable over the Southern Pacific route than over the Bieber route between Portland and points in California. There was also evidence of cost factors sharply in favor of the Southern Pacific route between California and Portland (R. 638, 639).

Both Western Pacific and the United States seem to contend that the respective routes south of Portland are comparable, relying not on contemporaneous evidence but outdated Commission decisions involving irrelevant issues (App. brf., p. 65, fn. 56, and p. 67, fn. 59; U. S. brf., p. 31, fn. 18). Obviously, in the proceeding authorizing construction of the connecting link that joined the Western Pacific and the Great Northern to create the Bieber route, *Great Northern Ry. Co. Construction,* 166 I.C.C. 3 (1930), the Commission made no attempt to compare operating conditions over the not-yet constructed Bieber route with the Southern Pacific route to Portland. Likewise, the decision referred to by the United States (p. 31, fn. 18), *Pacific Coast Fourth Section Applications,* 190 I.C.C. 273 (1932), relates to issues under Section 4 of the Act which are entirely foreign to a Section 3(4) proceeding.

The Commission, in the present case, did not resort to stale findings of fact in cases involving completely different issues, but based its evaluation of the routes south of Portland on the detailed testimony and exhibits

of a Southern Pacific witness (Exs. 33-35, R. 307-328, 483-502). This evidence was unrebutted.

Most importantly with respect to the discrimination issue, the Commission compared overall distances and overall transit times between points in California and points in the Northwest over the respective routes and found the evidence significantly favors the Southern Pacific route (R. 636-640). The Commission's finding that the routes that would be created if Northern Pacific and Union Pacific became Bieber-route participants would be longer, more difficult to operate and more circuitous than the allegedly preferred Southern Pacific route (R. 641), is unassailable since it is based upon evidence presented by Western Pacific, as well as Northern Pacific and Union Pacific, witnesses (Ex. 9, R. 48, 359-402; R. 70-73, 217, 218; Ex. 32, R. 306, 473-482; R. 270-271, 307-328, Exs. 33-35, R. 328, 483-502).[39]

Western Pacific criticizes the Commission's finding that transit times are markedly superior over the Southern Pacific route than over the Bieber route, urging that the Commission erred in its reliance on present schedules (pp. 69, 70). The objection that the performance

[39] The existence of Union Pacific's direct route between the Northwest and southern California is irrelevant to the Section 3(4) issue; Western Pacific is not challenging the rates in effect over this route as being discriminatory and it is neither a preferred nor a prejudiced route. Rates over Union Pacific's direct route equal to those over the Southern Pacific route are primarily limited to traffic between Idaho and eastern Washington and Oregon and southern California points served by Union Pacific, and do not include all commodities (R. 215).

finding was based on present schedules is invalid. As Western Pacific points out, the only volume of traffic to Northern Pacific and Union Pacific points is moving via Southern Pacific (pp. 69, 70). There was no evidence relating to the actual transit time incurred by the cast-iron pipe movement or the few other shipments transported to or from Northern Pacific and Union Pacific points via the Bieber route.[40]

Witnesses for Northern Pacific and Union Pacific did testify with respect to transit time and submitted exhibits showing the published freight-train schedules that would govern the transportation of freight between California and the Northwest when participated in by Northern Pacific and Union Pacific with the Great Northern - Western Pacific, on the one hand, and Southern Pacific on the other (Ex. 28, 29, R. 256-260, 265, 276, 468-470). This evidence is the basis of the Commission's findings that transit is significantly faster over the allegedly preferred Southern Pacific route than over the allegedly prejudiced Bieber route to or from Northern Pacific and Union Pacific points. The Western Pacific can hardly object to the use of current schedules as its own witness submitted train schedules between California and the Northwest

[40] Western Pacific seems to suggest that there has been no criticism of the cast-iron pipe movement. A Union Pacific witness testified that because of the backhauling involved and because Union Pacific received the cars from the Great Northern at Portland instead of Bend where Great Northern first connects with Union Pacific on the Bieber route, the arrangement for transporting cast-iron pipe is not entirely satisfactory to Union Pacific (R. 216).

for all the railroads involved (R. 66, 71, Ex. 23, 24, R. 78, 463, 464).

Western Pacific acknowledged the importance of transit time in arguing to the District Court that the test of similarity of circumstances and conditions must be based on performance (R. 685). A meaningful performance test must compare the transportation service presently provided over the Southern Pacific route to or from points on the Northern Pacific and Union Pacific in the Northwest with the performance and service that would be available if Northern Pacific and Union Pacific participated in the Bieber route. The latter circumstance must always take into consideration the interchange between Northern Pacific or Union Pacific and Great Northern at Portland with the attendant circuity and added operational difficulties.

The fallacy of Western Pacific's argument is that when speaking of performance it refers to the present Bieber route to Great Northern points in the Northwest. Admittedly, this service is good as the Great Northern route is direct and does not require an interchange at Portland. Shippers who indicated they preferred the Bieber route were speaking of the present Bieber route directly to or from Great Northern points in the Northwest. These witnesses had not used the Bieber route to or from Northern Pacific or Union Pacific points and, of course, had no idea what the quality of service would be if Northern Pacific and Union Pacific were required

to interchange shipments with the Great Northern at Portland.[41]

In this connection, counsel for the Western Pacific argued before the District Court that shippers who had a choice of routes preferred the Bieber route, referring to a study of shipments originating on the Santa Fe and destined to points in the Northwest (R. 686).[42] This evidence is worthless as a performance test, first, because it matches the present Bieber route with the present Southern Pacific route, but does not provide any comparison with the allegedly prejudiced route. Second, it is understandable that most shippers located on the Santa Fe would route over that line to Stockton and then over the Bieber route rather than over the Santa Fe's competitor, the Southern Pacific. Any other result would be surprising in view of the testimony of the Western Pacific traffic witness who described the close cooperation of the Santa Fe, Western Pacific and Great Northern in traffic solicitation, freight-train schedules and joint rates (R. 33).

Western Pacific also argues that the Commission erred in considering the Bieber route a multiline route with excessive interchanges and circuity when compared to the Southern Pacific route (pp. 65, 66). In this objection to the Commission's factual determina-

[41] Several shipper witnesses acknowledged they did not know what service could be provided if Northern Pacific and Union Pacific were to participate in the Bieber route (R. 122, 135, 137).

[42] The witness introducing this study admitted that it included traffic to and from points beyond the scope of the complaint (R. 207).

tion the Western Pacific is on thin ground, indeed, since it has repeatedly stressed the Bieber-route partnership, a combination requiring interchanges between railroads at Stockton and Bieber with a third interchange taking place at Portland if Northern Pacific and Union Pacific are to be drawn into the Bieber route. In every comparable movement, the Bieber route involves greater multiline handling, with attendant operational complications, than does the Southern Pacific route as reference to the map attached as Appendix B reveals.

The interchange or transfer of cars at Portland is an integral element of the transportation service under study, and the Commission made detailed findings of the greater distance, time and cost involved when cars are transferred at Portland between Great Northern and Union Pacific when handled over the Bieber route than when the transfer takes place between Southern Pacific and Union Pacific (R. 637-638).

By means of testimony and a map exhibit, a Union Pacific witness demonstrated that a transfer of cars between Great Northern and Union Pacific at Portland would move through three terminals and over two river bridges, three times the distance required for a Southern Pacific - Union Pacific transfer; that the time required for the Great Northern interchange is four times that required with Southern Pacific, and that the cost is almost eight times greater (R. 231-233, Ex. 27, R. 250, 467). This evidence was confirmed in large degree by Western Pacific's operating witness who conceded that cars interchanged by Union Pacific with

Great Northern would go through three terminal yards, while no intermediate yard handling was required for an interchange with the Southern Pacific (R. 70).

Western Pacific also argues that the differences in interchange arrangements are within the operating control of the carriers and should be worked out by the parties (pp. 70, 71). This ignores the fact that Great Northern cars terminate their road haul at Vancouver, Washington, and must be interchanged through three yards and over the Columbia and Willamette Rivers to the Union Pacific's Albina Yard in Portland. This is a physical circumstance that simply cannot be changed.[43] The cases cited by Western Pacific are inapposite, involving disputes between carriers over the location of points of interchange (p. 71, fn. 62).[44] Union Pacific and Great Northern have no disagreement over the manner in which cars are interchanged; the operation is as efficient as physical circumstances permit. It is interesting to note that it is the Western Pacific, terminating 490 miles from Portland, which insists operating difficulties at the Portland transfer can easily be solved. Great Northern, the carrier directly involved,

[43] The map of Portland-Vancouver (Ex. 27, R. 250, 467) graphically illustrates the complexity of the Union Pacific-Great Northern interchange.

[44] *Atlantic Coast Line R. Co.* v. *Southern Ry. Co.*, 321 I.C.C. 283, 290 (1963), can be further distinguished in that the seven-mile transfer was from one yard of the defendant to another yard of the defendant and thus wholly within defendant's control. On the other hand, traffic interchanged between the Union Pacific and Great Northern is effected through the successive handling by SP&S engines and crews and Northern Pacific Terminal Company engines and crews, a circumstance not present in the interchange with Southern Pacific (R. 228).

did not introduce any evidence and did not dispute the evidence introduced by the Union Pacific.

The Commission also noted that if Northern Pacific and Union Pacific were required to participate in joint rates with Western Pacific and Great Northern over the Bieber route, they would be forced to exchange traffic with the Great Northern at Portland, even though both carriers also serve Bend, Oregon, a point of connection with the Great Northern, some 246 miles south of Portland (R. 640). The Northern Pacific and Union Pacific would thus be short-hauling themselves by delivering traffic to the Great Northern at Portland—a carrier competing directly with appellees at many points in the Northwest—even though both Northern Pacific and Union Pacific are capable of providing service over the Bieber route as far as Bend.

The injustice of such a result was recognized by the Commission with the observation that the Northern Pacific has refrained from establishing joint rates through Bieber with Great Northern, its strongest competitor, and it is fearful that the establishment of such rates would enable the Great Northern to solicit its traffic (R. 627).

Traffic officials of Northern Pacific and Union Pacific testified that while their lines compete with Great Northern in the northwestern states, there is no competition with the Southern Pacific. The establishment of through routes and joint rates with the Southern Pacific at Portland is logical and represents a sound

business practice, while a similar arrangement with Great Northern would not (R. 214, 273, 274).

The evidence demonstrates that if the Northern Pacific and Union Pacific were to participate in joint rates via Portland and the Bieber route, they would suffer competitively from the resulting inefficient and uneconomic transportation. In every instance, shipments routed over the proposed route from Northern Pacific or Union Pacific points to Portland, then over the Great Northern via Bieber, would incur a substantially greater elapsed transit time than if moved from the same point over the present Southern Pacific route. Forced participation in this slow, inefficient service would have an immediate impact on the Northern Pacific and Union Pacific. A carrier cannot successfully meet competition from other railroads or motor carriers by providing an inferior service. Therefore, the refusal of Northern Pacific and Union Pacific to participate in such wasteful transportation is founded on sound economic and commercial considerations.

The United States suggests that certain operating conditions on the Bieber route would justify the action of Northern Pacific and Union Pacific in declining to join the Western Pacific in joint rates, indicating, as examples, the feasibility of the connection and the ability to gain a fair return on the traffic (p. 30, fn. 18). While the United States would not consider the length or difficulty of the Bieber route sufficient justification for a refusal to participate in joint rates, this observation may relate only to the present Bieber route,

or at least the portion of the Bieber route south of Portland.

One significant example of a justification for the existing rate arrangements is found in the suggestion of the United States that Northern Pacific and Union Pacific would not be guilty of discrimination if their participation in joint rates via the Bieber route would compel them to offer substandard transportation which might potentially destroy their good will. This is precisely what would happen if Western Pacific's complaint were granted and that is exactly why Northern Pacific and Union Pacific have refrained from participating in joint rates with Great Northern and Western Pacific over the Bieber route.

Northern Pacific's traffic witness pointed out that Great Northern's participation in the Bieber route would immediately provide Great Northern with traffic information that it could use for competitive advantage (R. 273, 274). This witness explained that traffic routed over the Bieber route and interchanged with the Northern Pacific at Portland would incur slow, circuitous routing that would result in shipper dissatisfaction, prompting the shipper to retaliate and take business away from the Northern Pacific (R. 296). The Northern Pacific witness discussed the competitive disadvantage that would result in the following manner:

> "A. Well, the shipper will make the decision, certainly, but let us just take a man that, at Spokane for example, assume he gets a car of oranges,

routes it out via the Bieber route. He has both of them going to Spokane. One of them would travel east of Wishram up to Spokane, over the Great Northern route, the short route; the other car around through Portland.

"If he was in a hurry for the car that was going via our route, it would just be too bad. He would be displeased with our service, and the chances are he would say, 'Well, don't give the Northern Pacific any more business.'

"The Great Northern route is so superior they might take other business away from us.

"When the shipper gets mad he is liable to do anything, and one thing that will make him awful mad is poor service." (R. 299, 300)

Similarly a witness for the Union Pacific also explained that interchange is conducted with Southern Pacific and not with Great Northern at Portland for competitive reasons (R. 214).

In support of its contention that circumstances and conditions are similar, Western Pacific asserts that the Bieber route has competed successfully with the Southern Pacific route wherever rates have been equalized (pp. 64, 65). There is no doubt that the Bieber route competes vigorously with the Southern Pacific route between points in California and points in the Northwest. These parallel competing routes do not stop at Portland but continue into the Northwest, the Southern Pacific by extension to points on the Northern Pacific and Union Pacific and the Bieber by extension to points on the Great Northern. Both routes serve most

major points in the Northwest and provide vigorous competition.[45]

This competition between California and all major points in the Northwest was emphasized by Western Pacific's principal traffic witness who stated that Santa Fe - Great Northern - Western Pacific work as partners in the solicitation of traffic via Bieber to points on the Great Northern. The sales activities are coordinated and the railroads have close working arrangements. The Western Pacific witness also stated that Santa Fe and Western Pacific freight-train schedules are keyed to produce the best possible service to the Northwest, but that Santa Fe does not have working schedules with the Southern Pacific on California-Northwest traffic. The witness also acknowledged that the Santa Fe has more rates via Bieber to the Northwest than it has with Southern Pacific (R. 33).

This evidence explains why the Bieber route competes so effectively with the Southern Pacific route to all major points in the Northwest, and it points up an aspect of this case conveniently ignored by the Western Pacific and overlooked by the United States. There is presently vigorous two-route competition because Santa Fe - Western Pacific - Great Northern work as partners in the solicitation of freight and establishment of schedules against the route of South-

[45] Table 12, Ex. 3, R. 21, 338, lists a few relatively smaller stations in the Northwest served by Northern Pacific or Union Pacific and not by the Great Northern. It should be noted that some of these stations are served by the Milwaukee Railroad which does participate with the Western Pacific via the Bieber route.

ern Pacific - Northern Pacific or Union Pacific. This is healthy competition and it has served the needs of the shipping public.[46]

The Commission made no specific finding with respect to competition, but its finding that additional routes and rates are not necessary or desirable in the public interest is recognition of the sufficiency of the present competitive routes. This finding flatly contradicts the conclusion of the United States that the existing rate arrangement inhibits competition—an erroneous inference drawn from a misreading of the record. If a full line of joint rates were established over the Bieber route by the Northern Pacific and the Union Pacific, competition would be diffused. Great Northern, for example, would not solicit traffic over the Bieber route for the purpose of turning it over to the Northern Pacific or Union Pacific at Portland, nor would there be any incentive for the Great Northern to improve freight-train schedules in conjunction with the Northern Pacific and Union Pacific. Naturally, it would prefer its maximum haul to Bieber. This, perhaps, explains why the Great Northern has been a passive participant in this case, rather than an active complainant. It is significant that both Santa Fe and Great Northern have not introduced any evidence in

[46] Many shippers who testified acknowledged the existence of this competition and the fact that they had two routes available (R. 108, 121, 125, 126, 128, 134, 137, 142, 151, 156, 157, 164). With respect to the Section 1(4) issue, the Commission held that the public interest did not require the additional routes and rates sought by the Western Pacific (R. 645).

this proceeding and have not asserted that competition would be enhanced in any way if Western Pacific's complaint is satisfied.

If Northern Pacific and Union Pacific were forced to participate in joint rates with the Bieber route, they would have little incentive for solicitation over that route, only to see the Great Northern handle the traffic along a line paralleling the Northern Pacific and Union Pacific lines between Portland and Bend, Oregon. It would be manifestly impossible for Northern Pacific and Union Pacific to compete with Great Northern from or to points east of the Cascades via the Bieber route, as the Great Northern would shunt its traffic directly south from Wishram while Northern Pacific and Union Pacific would be forced to continue the roundabout movement through Portland.

3. The Commission's Conclusion That No Discrimination Exists Is a Question Confided to the Judgment of the Commission and Should Be Affirmed.

The United States asserts that the Commission did not treat in detail the question of discrimination and the attendant issue of "similarity of circumstances and conditions" (p. 13, fn. 8). To the contrary, the Commission entered specific findings of fact relating to this issue, evaluated the evidence, made appropriate subsidiary findings and from this, reached its ultimate conclusion. Nothing more is required by the Admin-

istrative Procedure Act (5 U.S.C. §§1101-11) or the holdings of this Court.

The Commission compared the allegedly preferred route—Northern Pacific and Union Pacific in conjunction with Southern Pacific—with the allegedly prejudiced route—Northern Pacific or Union Pacific in conjunction with Great Northern, Western Pacific and Santa Fe—the Commission evaluated the evidence relating to all segments of these routes and entered five pages of specific findings of fact (R. 635-640). Next, observing that equality of treatment is determined by similarity of circumstances and conditions, the Commission entered its subsidiary finding on the similarity question by stating:

> "The routes sought through Bieber and Portland are longer and involve more difficult operating conditions than the Southern Pacific route, and they require hauls in a general direction opposite to the direct movement." (R. 641)

After having concluded that Western Pacific was not a "connecting line" of Northern Pacific and Union Pacific within the meaning of Section 3(4), the Commission returned to the remaining principal issue and reached the conclusion that—

> "Even if the complainants were connecting carriers, the evidence of record does not establish the similarity of circumstances and conditions which justifies equality of treatment." (R. 643)

The issue of discrimination was disposed of by the ultimate conclusion—one flowing logically from the findings of fact and subsidiary finding—that the failure and refusal of Northern Pacific and Union Pacific to establish through routes and joint rates with the Western Pacific through Bieber and Portland does not result in discrimination in violation of Section 3(4) of the Act (R. 645).

This orderly and thorough treatment of the discrimination issue is strikingly similar to the Commission's decision under review in *Minneapolis & St. Louis R. Co.* v. *U. S.*, 361 U.S. 173 (1959). The Court observed that the Commission devoted five pages to the issue of competition and while it did not make express findings on all matters discussed, its subsidiary findings fully supported its conclusion. With respect to the requirements of the Administrative Procedure Act, this Court said:

> "By the express terms of § 8(b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.' From a thorough examination of the record, we are persuaded that the Commission has made adequate subsidiary findings upon all material issues and has made the ultimate findings required by § 5(2), that they support the Commission's order, and are, in turn, supported by substantial evidence." (pp. 193-194)

Finally, this Court has held that when the Commission has found that the circumstances and conditions were similar, the Court cannot substitute its judgment for that of the Commission. See *Chicago, I. & L. Ry.* v. *United States*, 270 U.S. 287, 294 (1926). Or, as expressed in *United States* v. *Trucking Co.*, 310 U.S. 344, 352 (1940)—

> "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

See also *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481 (1918), and *Nashville Ry.* v. *Tennessee*, 262 U.S. 318, 322 (1923). Thus, even if the Court were disposed to reach a contrary conclusion if it tried the matter *de novo*, it may not, on this basis, set aside the Commission's finding.

As we have demonstrated, the Western Pacific is not a connecting line of the Northern Pacific or Union Pacific and therefore the decision of the District Court should be affirmed. However, if this Court reaches the Commission's further finding, that the evidence of rec-

ord does not establish the necessary similarity of circumstances and conditions which would justify equality of treatment to Portland, we suggest that the case be remanded to the District Court for initial consideration of this issue. Finally, if this Court believes that remand is not warranted, we submit the case should also be affirmed on the latter basis because the Commission has applied the correct standard, its findings are adequate to support its ultimate conclusion, and its subsidiary findings are based on substantial evidence of record.

CONCLUSION

The Commission's finding that additional routes and rates are not required, in the public interest, between points in California and points in the Northwest pursuant to Section 1(4) and Section 15(3) of the Act has not been challenged by the Western Pacific either in the District Court or in this Court. Nevertheless, appellants contend that the refusal of the Northern Pacific and the Union Pacific to establish such additional routes and rates constitutes a violation of Section 3(4) of the Act.

The Commission properly found that the Western Pacific failed to bring itself within the purview of Section 3(4) as a connecting line of the Northern Pacific and the Union Pacific at Portland, which finding was affirmed by the District Court. Moreover, the Commission's further finding that the appellants failed to establish the necessary similarity of circumstances and conditions as between the allegedly prejudiced line and

the allegedly preferred line which would justify equality of treatment at Portland is based upon the proper legal standard, is supported by adequate subsidiary findings which are, in turn, sustained by substantial evidence of record.

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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September 23, 1965

PROOF OF SERVICE

I, Frank S. Farrell, Attorney for these Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1965, I served copies of the foregoing Brief for Appellees Northern Pacific Railway Company, Union Pacific Railroad Company, and Southern Pacific Company on the several parties as follows:

1. On the United States by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: Thurgood Marshall, Esq., The Solicitor General; Donald F. Turner, Jr., Esq., Assistant Attorney General; Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D. C., and Cecil F. Poole, Esq., United States Attorney, San Francisco, California.

2. On the Interstate Commerce Commission by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: Robert W. Ginnane, Esq., General Counsel, and Robert S. Burk, Esq., Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On The Western Pacific Railroad Company, Sacramento Northern Railway Company and Tidewater Southern Railway Company, Appellants, by mailing a copy, properly addressed, with air mail postage prepaid to each of the following: E. L. Van Dellen, Esq., and Walter G. Treanor, Esq., 526 Mission Street, San Francisco 5, California, and E. Barrett Prettyman, Jr., Esq., 800 Colorado Building, Washington 5, D. C.

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APPENDIX A

Statutes Involved Before the Commission

The duty of carriers to establish through routes and just and reasonable rates applicable thereto is imposed by Section 1(4) of the Interstate Commerce Act (49 U.S.C. §1(4)) which provides:

> "(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

The Commission's jurisdiction to prescribe through routes and joints rates, subject to certain safeguards, is set forth in Sections 15(3) and 15(4) of the Interstate

Commerce Act (49 U.S.C. §§15(3) and 15(4)) which provide:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

"(4) In establishing any such through route the Commission shall not (except as provided in section 3 of this title, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without

notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."